

### **DETAILED ACTION**

This Office Action is written in response to Applicant's Remarks filed 3/5/10.

#### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1, 2, 4-7 and 9 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Claim 1 contains contradictory language. It is unclear what Applicant is intending to claim because claim 1 contains "consisting of" language which limits the method to using one or more of the dark fruits listed. However, Applicants add that the claim can optionally contain a probiotic which contradicts making the claims closed to other materials.

4. Claim 4 recites the limitation "the dark fruit is...cranberry" in lines 1 and 2 of claim 4. There is insufficient antecedent basis for this limitation in the claim.

5. Claims 6 and 7 contain contradictory language. It is unclear what Applicant is intending to claim because claims 1 and 5 contain "consisting of" language which limits the method to using one or more of the dark fruits listed. However, in claims 6 and 7, Applicants add that the dark fruit juice is present from 1-40% (claim 6) and 1-20%(claim 7), it appears that other materials can be used to make up the remaining percentages which contradicts the purpose of making the claims closed to other materials.

6. Claim 6 recites a beverage concentrate. However, it is unclear how the beverage can be a concentrate when the fruit juice is said to be single strength.

***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

8. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

9. **Claims 1, 4, and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1996 <http://www.crfg.org/pubs/ff/currants.html> in view of Puupponen-Pimia et al. (2004 Bioscience Microflora Vol. 23 (2), 67-80).**

**Regarding Claim 1, 4, and 9:** CRFG discloses black currant fruit for culinary purposes (food, consumption) [page 4] but does not disclose its ability to promote the growth of beneficial bacteria and to reduce the growth of harmful bacteria. However, Puupponen-Pimia discloses that berries such as black currants are high in phenolic compounds [pg 68, 2<sup>nd</sup> full para] and that berry phenolics inhibit the growth of intestinal pathogens such as pathogenic Gram negative *Salmonella* and *E. coli* but did not inhibit the growth of lactobacillus species [pg 74, lines 5-12 and last para]. It is known in the art that many lactobacillus species are members of the group of beneficial intestinal bacteria.

At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of CRFG and Puupponen-Pimia before him or her to utilize the blackcurrant of CRFG in order to provide very well known health benefits found in phenolic compounds and also to provide the antimicrobial activity of black currants in the intestine as described by Puupponen-Pimia.

10. **Claims 2 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1996 <http://www.crfg.org/pubs/ff/currants.html> and Puupponen-**

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**Pimia et al. (2004 Bioscience Microflora Vol. 23 (2), 67-80) as applied to claim 1 above and in further view of Bormann (EP 0531 155 –Applicant’s NPL).**

**Regarding Claims 2 and 5:** CRFG discloses black currants as discussed above but does not disclose it in the form of a juice or beverage. However, Bormann discloses blackcurrant juice and using it in a liquid/aqueous form [pg. 6, lines 14-24].

At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of CRFG, Puupponen-Pimia, and Bormann before him or her to utilize the black currant fruit in juice and beverage form in order to provide very well known health benefits found in phenolic compounds also to provide the antimicrobial activity of black currants in the intestine as described by Puupponen-Pimia in a drinkable form.

**11. Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1996 <http://www.crfg.org/pubs/ff/currants.html> and Puupponen-Pimia et al. (2004 Bioscience Microflora Vol. 23 (2), 67-80) as applied to claim 1 above and in further view of Mills et al. (US 5,855,948).**

**Regarding Claims 5 and 6:** CRFG discloses black currants as discussed above but does not disclose it in the form of a beverage that is concentrated and contains 1-40% single strength juice. However, Mills discloses a concentrated beverage containing 5 -40% juice and that the juice can be blackcurrant juice and that the juice can be sourced from single strength juice [col. 3, lines 34-43; col. 4, lines 8-17].

At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of CRFG, Puupponen-Pimia, and Mills before him or her to utilize the black currant fruit in beverage and concentrated beverage form in order to provide very well known health benefits found in phenolic compounds also to provide the antimicrobial activity of black currants in

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the intestine in a convenient form that can be diluted according to the personal taste of the consumer.

**12. Claims 5 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1996 “Currants Fruit Facts”**

<http://www.crfg.org/pubs/ff/currants.html> and Puupponen-Pimia et al. (2004 Bioscience Microflora Vol. 23 (2), 67-80) as applied to claim 1 above and in further view of Kiev (SU 1015883- Derwent Abstract).

**Regarding Claims 5 and 7:** CRFG discloses black currants as discussed above but does not disclose it in the form of a beverage that is ready to drink and contains 1-20% single strength juice. However, Kiev discloses a non-alcoholic beverage that contains 2.0 to 3.6% black currant juice and has medicinal properties [Abstract].

At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of CRFG, Puupponen-Pimia, and Kiev before him or her to utilize the black currant fruit in ready to drink beverage form in order to provide very well known health benefits found in phenolic compounds and also to provide the antimicrobial activity of black currants in the intestine in a convenient ready to drink form.

**13. Claims 1, 4, and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1997 “Pomegranate Fruit Facts”**

<http://www.crfg.org/pubs/ff/pomegranate.html> in view of Ivanovich (RU 2120295 Abstract –Applicant’s NPL) and Herbal Remedies 2003

<http://web.archive.org/web/20031216205006/http://www.herbalremedies.com/pojucok8floz.html>.

**Regarding Claims 1, 4, and 9:** CRFG 1997 discloses pomegranate fruit but does not disclose its ability to promote the growth of beneficial bacteria and to reduce the growth of harmful

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bacteria. However, Ivanovich discloses that pomegranate can be used to inhibit the growth of pathogenic gastroenteric (gastrointestinal) microorganisms such as *Salmonella* and *Cholera*.

Additionally, Herbal Remedies, discloses that pomegranates are a cure for diarrhea [page 1]. It is well known that *Salmonella* is a type of bacteria that causes diarrhea. It is also known that inhibiting the growth of pathogenic bacteria sustains the growth of beneficial bacteria.

At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of CRFG 1997, Ivanovich, and Herbal Remedies before him or her to utilize the pomegranate of CRFG 1997 in order to form juice with the additional health benefit of inhibiting the growth of pathogenic microorganisms and thereby allowing for the maintenance of beneficial bacteria.

14. **Claims 2, 5, and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1997 “Pomegranate Fruit Facts”**

**<http://www.crfg.org/pubs/ff/pomegranate.html> in view of Ivanovich (RU 2120295 Abstract –Applicant’s NPL) and Herbal remedies <http://web.archive.org/web/20031216205006/http://www.herbalremedies.com/pojucok8floz.html>, as applied to claim 1 above and in further view of Kupper et al. (US 4,612,205).**

**Regarding Claims 2, 5, and 7:** CRFG 1997 discloses pomegranate fruit but does not disclose it in juice form, in beverage form or in a ready to drink form. However, Kupper discloses a ready to drink beverage containing plum and pomegranate juice that has single strength pomegranate in an amount of up to 15% [col. 2, lines 15-21, 26-34, 41-53, 65, 66; col. 3, lines 1-3].

At the time of the invention it would have been obvious to one of ordinary skill in the art having the teachings of CRFG 1997, Ivanovich, Herbal Remedies and Kupper before him or her to utilize the pomegranate of CRFG 1997 in order to form juice with the additional health benefit of

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inhibiting the growth of pathogenic microorganisms and thereby allowing for the maintenance of beneficial bacteria in a convenient ready to drink form.

***Response to Arguments***

15. Applicant's arguments with respect to claims 1, 2, 4-9 have been considered but are moot in view of the new grounds of rejection. The prior art references relied upon in the previous Office Action provided disclosures of the intestinal benefits of cranberries. However, Applicants have amended the claims to remove the limitation of cranberries as within the group of dark fruit and have amended the claims to include probiotics as optional. The claims are now rejected as follows:

Claims 1, 4, and 9 are rejected under California Rare Fruit Growers (CRFG) 1996 and Puupponen-Pimia et al. (2004 Bioscience Microflora Vol. 23 (2), 67-80).

Claims 2 and 5 are rejected under California Rare Fruit Growers (CRFG) 1996, Puupponen-Pimia et al. and Bormann (EP 0531 155- Applicant's NPL).

Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1996, Puupponen-Pimia et al., and Mills et al. (US 5,855,948).

Claims 5 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1996, Puupponen-Pimia et al., and Kiev (SU 1015883- Derwent Abstract).

Claims 1, 4, 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1997, Ivanovich (RU 2120295 Abstract –Applicant's NPL) and Herbal Remedies 2003.

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Claims 2, 5, and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over California Rare Fruit Growers (CRFG) 1997, Ivanovich (RU 2120295 Abstract –Applicant’s NPL) and Herbal Remedies, and Kupper et al. (US 4,612,205).

### ***Conclusion***

16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure:

Ooghe “Contribution to the determination of the fruit juice content of fruit juice beverages and syrups” Zeitschrift für Lebensmitteluntersuchung und -Forschung A (1990) 191:199-205. disclosing 7.7%black currant juice mixed with lemonade and elderberry juice.

Gil et al. J. Agric. Food Chem 2000, vol. 48. pgs 4851-4589 discloses single strength pomegranate juice [[pg. 4581- Materials].

United States International Trade Commission Rulings and Harmonized Tariff Schedule December 1993 HQ 953925 <http://www.faqs.org/rulings/rulings1994HQ0953925.html> disclosing “Ribena”, a concentrated blackcurrant Juice Drink containing blackcurrant juice.

17. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be

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calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to FELICIA C. KING whose telephone number is (571)270-3733. The examiner can normally be reached on Mon- Thu 7:30 a.m.- 5:00 p.m.; Fri 7:30 a.m. - 4:00 p.m. alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on 571-272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/F. K./

Examiner, Art Unit 1784

/Jennifer C. McNeil/

Supervisory Patent Examiner, Art Unit 1784